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February 18, 2009

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: October 31, 2008

Case Number: TSO-0688

This decision concerns the eligibility of XXXXXXXXXXXX ("the Individual") for a DOE access authorization.<sup>1</sup> This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the Individual's suspended access authorization should not be restored at this time.

**I. BACKGROUND**

This administrative review proceeding began with the issuance of a notification letter by a Department of Energy (DOE) local security office (LSO), informing the Individual that information in the possession of the DOE created a substantial doubt pertaining to his eligibility for an access authorization.<sup>2</sup> See Notification Letter, June 23, 2008.

The Notification Letter cites the Individual's admission that he "illegally used marijuana on fifteen occasions between July 2003 and September 2003" as a security concern under 10 C.F.R. § 710.8(k) (Criterion K). *Id.* Criterion K pertains to information indicating that an individual has "trafficked in, sold, transferred, possessed, used, or experimented with" illegal substances. See 10 C.F.R. § 710.8(k).

The Notification Letter further cites a security concern under 10 C.F.R. § 710.8(f) (Criterion F). Criterion F pertains to false statements or misrepresentations by an individual during the course of an official inquiry regarding the individual's eligibility for access authorization, including responses during personnel security interviews or on security questionnaires. Such statements raise serious doubts regarding the individual's honesty, reliability, and trustworthiness. See 10 C.F.R. § 710.8(f). The Individual signed and submitted a Questionnaire for National Security

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<sup>1</sup> Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

<sup>2</sup> Access authorization, also known as a security clearance, is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

Positions (QNSP) in October 2006 and another in April 2008 on which he indicated, *inter alia*, that he had not used any illegal drugs in the past. DOE Exs. 7, 8. The Letter cites the Individual's admission during an August 2008 Personnel Security Interview that he intentionally omitted information about his 2003 marijuana use because he was afraid of the consequences with regard to his ability to obtain a security clearance. *See* Notification Letter.

Upon receipt of the Notification Letter, the Individual requested a hearing in this matter. *See* Individual's Letter, October 14, 2008. In his letter, the Individual did not dispute the facts set forth in the Notification Letter. Rather, he stated that the events listed in the Letter were past lapses in judgment that would not recur in the future. *Id.* At the hearing, the Individual presented his own testimony, as well as the testimony of his mother-in-law, his cousin, two friends, and his supervisor. The DOE counsel did not present any witnesses.

## II. HEARING TESTIMONY

### A. The Individual

The Individual is 23 years old. Hearing Transcript ("Tr.") at 93. He testified that he used marijuana for the first time in July 2003, when he was 18 years old. Tr. at 87. In July 2003, the Individual moved in with several roommates prior to beginning college. The roommates were marijuana users and introduced him to it. Tr. at 87-88. The Individual stated that he stopped using marijuana in October 2003 because "it's not my thing." Tr. at 89. He added that he stopped using marijuana because he saw the effect the drug had on his roommates and he had other interests he wanted to pursue while in college. *Id.* The Individual estimated that he used marijuana 13 or 14 times between July 2003 and his last use in October 2003. The Individual stated that the period in which he used marijuana was "a real down period" in his life and he was drawn into his then-roommates' lifestyle. Tr. at 103. He stated that he was "able to finally get away from that" and he does not "want to go back to something like that." Tr. at 103. He added, "I associate the marijuana with that and the bad things that I went through there, and I don't ever want to go back to that. I have too much now ...." *Id.*

The Individual is a member of an alternative rock/punk band. Tr. at 105. He acknowledged that that particular genre of music can draw an audience which is inclined to use illegal substances, but asserted that he and his band members are all against the use of illegal drugs. Tr. at 105-106. He stated that he has never suspected that anyone in the audience at one of his band's shows was using illegal drugs, primarily because they are a small band and their audience is comprised mainly of family and friends. Tr. at 105. The Individual stated that in the future, as his band grows in popularity and begins to play larger venues, it is possible that members of the audience would engage in illegal drug use. He added that if he saw anyone using illegal drugs at one of their shows or believed it was occurring, he would do everything possible to get the individuals using drugs to stop or have them removed from the premises. Tr. at 106. The Individual also stated that he does not associate with anyone who uses illegal drugs. Tr. at 107.

The Individual acknowledged that he provided false answers on both his October 2006 and April 2008 QNSPs to the question asking whether he had used illegal drugs in the past.<sup>3</sup> Regarding the

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<sup>3</sup> Question 24 on both the 2006 and 2008 QNSPs asks, *inter alia*, whether an individual "since the age of 16 or in the last 7 years, whichever is shorter" has "illegally used any controlled substance," including marijuana. DOE Exs. 7, 8.

2006 QNSP, the Individual stated that he omitted the information about his 2003 marijuana use because he believed that it was a minor issue since his marijuana use occurred over a short period of time several years before he completed the form. Tr. at 91-92. The Individual also sought out the advice of co-workers who had completed similar forms in the past because “it was all new to [him].” Tr. at 94. Those co-workers advised him that he should not list it since it was “not a big deal.” Tr. at 92-93. Despite the co-workers’ advice, the Individual was aware that he provided a false answer on the 2006 QNSP, and knowing he had lied on the form “started eating at [him] right away.” Tr. at 95.

The Individual’s employer submitted paperwork to upgrade the Individual’s clearance and, in April 2008, the Individual submitted another QNSP. Tr. at 97. The Individual answered “no” again to the question regarding whether he had used illegal drugs in the past. Tr. at 98. According to the Individual, he answered “no” again because he answered “no” on the 2006 QNSP and he wanted to avoid discrepancies between the two forms. Tr. at 98. However, he knew his answer was false when he completed the form. *Id.* The Individual’s conscience began to bother him because he had now lied on two separate forms. Tr. at 100.

As part of the process for upgrading his security clearance, the Individual was interviewed by an investigator from the Office of Personnel Management (OPM) after submitting his April 2008 QNSP.<sup>4</sup> *Id.* When the OPM investigator asked him whether he had ever used illegal drugs, the Individual disclosed his 2003 marijuana use. Tr. at 101. He decided that he needed to be honest and accept the consequences. *Id.* According to the Individual, the OPM investigator had not confronted him with any information she had learned about his past drug use; he revealed it to her voluntarily. *Id.*

The Individual admitted that, after falsifying the two QNSPs, he did not contact the LSO to correct the false answers because he “was worried of the consequences.” Tr. at 109-110. He added that when he decided to disclose his past drug use to the OPM investigator, he was still worried about the consequences, but he decided that he needed to tell the truth. Tr. at 110.

The Individual believes he can be trusted in the future. He stated that he has matured and “learned more about being honest.” Tr. at 107-108. He added, “I have more responsibility now ... I’m married, I have a band I’m trying to work at, you know, I’ve got my dad I help look out for now that he’s getting older, and I have all these responsibilities, my job, you know, I have things I have to get done ... for work and stuff.” Tr. at 108. The Individual realizes that it is “better to just be honest. I don’t want to risk all that I have now over, you know, some marijuana use that I should have just told [the LSO] about in the first place.” *Id.*

## **B. The Individual’s Mother-in-Law**

The Individual and the witness’ daughter were recently married. Tr. at 55. The Individual’s mother-in-law has known the Individual for approximately four years and has seen him almost

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<sup>4</sup> The OPM report indicates that the Individual was interviewed by the OPM investigator in May 2008. DOE Ex. 10.

daily since he began dating her daughter, who is five years his junior, over three years ago. Tr. at 52, 55.

The Individual told the witness about his past experimentation with marijuana when he was 18 or 19 years old. Tr. at 54. She stated that they had been discussing that period in his life and the Individual told her he had been depressed and had roommates who were bad influences. Tr. at 61. He described his past marijuana use as “a mistake.” Tr. at 55. The Individual’s mother-in-law has no reason to suspect that the Individual currently uses drugs or used them beyond the time period he admitted to. Tr. at 56. She stated that if she had any inkling that he was still involved with illegal drugs, she would have not allowed her daughter to continue dating him. *Id.* The Individual’s mother-in-law stated that based on past experience with people who have used illegal drugs, she is able to recognize “the signs” when people are using drugs and “none of the signs are there” with the Individual. Tr. at 58.

The Individual’s mother-in-law has gotten to know the Individual well and believes him to be an honest person. Tr. at 60. She stated that it was not long after the Individual began dating her daughter that she realized that the Individual “was a very trustworthy, responsible, level-headed young man. He doesn’t lose his temper and go over the top with his behavior ever.” Tr. at 67. She added, “there is just an awful lot of good about him. I’m very happy to have him as part of our family, and he gained my trust and my respect early on.” Tr. at 67.

### **C. The Individual’s Cousin**

The Individual’s cousin is 20 years old and has known the Individual for most of her life. Tr. at 9. She interacts with him “a couple times a month.” Tr. at 11. She stated that she has been to the Individual’s home and has never seen any evidence that he currently uses any illegal drugs. Tr. at 12. The Individual’s cousin stated that she has no reason to suspect the Individual uses illegal drugs because “he never really...parties.” Tr. at 13. She added, for example, that on his 21st birthday, he did not have more than two drinks. Tr. at 11. The Individual’s cousin had attended his band’s concerts. She stated that the concerts are small and they know everyone who attends. She would be surprised to learn that anyone in the audience was using illegal drugs. Tr. at 14-16. She stated that the concerts are small and generally take place at venues where drug use is unlikely to occur. Tr. at 17.

The Individual’s cousin believes he is honest. She stated, “he wouldn’t lie to anybody. I mean, he’ll tell you exactly what he thinks and what he does know, and he doesn’t know anything, he’ll tell you. He won’t say anything to benefit himself and harm somebody else, or jeopardize anything.” Tr. at 18. The Individual’s cousin described him as a “very upstanding citizen.” Tr. at 19. She stated that when they were growing up, the Individual would always be honest even if it was not in his best interest. He would never blame others for things he had done. Tr. at 21. Finally, the Individual’s cousin stated that the Individual was very reliable. *Id.*

### **D. The Individual’s Friends**

1. Friend 1

Friend 1 met the Individual through work in Spring 2005 and is now one of his “really good friends.” Tr. at 23, 37. He is also in the same band as the Individual. Tr. at 25. Friend 1 sees the Individual about two or three times per month. *Id.*

The Individual told him about his past marijuana use. Tr. at 24. The Individual told Friend 1 that he used marijuana when he was “in high school or just barely out of school” and was “going through some rough patches.” Tr. at 32. Friend 1 stated that the Individual does not engage in that behavior now. He added that, when they go out, the Individual will not even have one drink if he is going to be driving later that night because he does not want to pass the responsibility of driving onto someone else. *Id.* Friend 1 stated that neither he nor the Individual associates with anyone who uses illegal drugs. Tr. at 32, 34. Friend 1 has been inside the Individual’s home and has never seen anything related to illegal drugs in the home. Tr. at 34. Friend 1 would be surprised if any drug use occurred at their band’s concerts because the venues at which they appear “seem to be ... kind of family-oriented” and the audience for their shows is made up mostly of people they know, such as friends and family. Tr. at 27, 30-31.

Friend 1 admires the Individual’s drive and determination. Tr. at 25. He stated that the Individual is “that guy you want to be around, because he makes you really take stock of your life and think [about] what you want to do.” Tr. at 34-35. Friend 1 stated that the Individual is reliable. Tr. at 36. He added that the Individual is “the type of guy that’s going to do anything for anybody.” Tr. at 35.

## 2. Friend 2

The Individual and Friend 2 have been friends “on and off” for about 11 years. Tr. at 39, 42. They typically see each other about once a month. Tr. at 44. Other than the Individual telling him about his 2003 marijuana use, Friend 2 has never known the Individual to use drugs or associate with anyone who uses illegal drugs. Tr. at 43-44. He has socialized with the Individual at the Individual’s home and has never seen any illegal drugs or anything related to illegal drug use at the home. Tr. at 44. Friend 2 was surprised when he learned of the Individual’s past marijuana use. He stated, “I did think that it was something that ... was out of character for him ....” Tr. at 50.

Friend 2 stated that the Individual has a reputation for honesty. Tr. at 46. Friend 2 added, “even in our young days ... he wouldn’t be dishonest, he wouldn’t go and say things that weren’t true behind anyone’s back.” *Id.* Friend 2 also stated that the Individual was always honest with his schoolwork and never tried to cheat. Tr. at 46-47. Finally, Friend 2 stated that the Individual is reliable and is someone who generally follows the rules. Tr. at 47, 50.

## E. The Individual’s Supervisor

The witness has been the Individual’s supervisor since the Individual began working for the company, approximately three or four years ago. Tr. at 72, 75. The supervisor sees the Individual regularly, but they do not generally interact outside of work. Tr. at 73.

The Individual's supervisor has never suspected him of using illegal drugs. Tr. at 73. The supervisor described the Individual as "very dependable." Tr. at 73-74. He added that "normally you can see some of the signs when someone is doing drugs," but he has never seen the Individual exhibit any of those signs. *Id.* For example, the Individual rarely calls out sick. *Id.* The supervisor was surprised to learn of the Individual's past use of marijuana. He stated that the Individual is "a very courteous, clean-cut individual. He's very polite. I've never seen him even get angry ... He's not moody. He's dependable." Tr. at 75. The supervisor believes the Individual's 2003 marijuana use is a mistake he made in the past and believed the Individual did not appear to ever want to do it again. Tr. at 80-81. He stated, "[the Individual] didn't care for [the marijuana], he hasn't done it [recently], and I don't see any reason why he would ever get involved with drugs again." *Id.*

The Individual told the supervisor that he falsified his answers on the two QNSPs. The Individual told the supervisor that "he just doesn't know why he did it, and he didn't feel comfortable with it." Tr. at 82. The supervisor was not surprised that the Individual did not feel right about falsifying the QNSPs and that he "came clean" because the Individual has "always been honest and straightforward." *Id.*

Finally, the Individual's supervisor believed the Individual could be trusted in the future. He stated,

We all make mistakes, and he definitely made a big one. I think he realized how critical that mistake was as he's gotten a little older and matured, and he did come forward, and I'm sure he totally understood that by admitting that he had done drugs [in the past] and not admitting it [before], that it was going to cause come problems, but, you know, he ... had to get it off his chest.

Tr. at 83. The Individual's supervisor concluded that the Individual has always been honest with him "about everything" and does not try to hide any mistakes. Rather, he accepts responsibility for his actions. Tr. at 75-76.

### **III. STANDARD OF REVIEW**

The regulations governing the Individual's eligibility for an access authorization are set forth are 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). "Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." *Id.* See generally *Dep't of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security" test indicates that "security clearance determinations should err, if they must, on the side of denials").

Under Part 710, the DOE may suspend an individual's access authorization where "information is received that raises a question concerning an individual's continued access authorization eligibility." 10 C.F.R. § 710.10(a). Derogatory information includes, but is not limited to, the

information specified in the regulations. 10 C.F.R. § 710.8. Once a security concern is raised, the individual has the burden to bring forward sufficient evidence to resolve the concern.

In considering whether an individual has resolved a security concern, the Hearing Officer considers various factors, including the nature of the conduct at issue, the frequency or recency of the conduct, the absence or presence of reformation or rehabilitation, and the impact of the foregoing on the relevant security concerns. 10 C.F.R. § 710.7(c). The decision concerning eligibility is a comprehensive, common-sense judgment based on a consideration of all relevant information, favorable and unfavorable. 10 C.F.R. § 710.7(a). In order to reach a favorable decision, the Hearing Officer must find that “the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.27(a).

#### IV. ANALYSIS

##### A. Criterion K – Illegal Drug Use

It is beyond dispute that use of illegal drugs raises security concerns under Criterion K. *See* Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (issued on December 29, 2005 by the Assistant to the President for National Security Affairs, The White House) (the Adjudicative Guidelines), Guideline H, ¶ 24 (“Use of an illegal drug ... can raise questions about an individual’s reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.”); *see also* *Personnel Security Hearing, Case No. VSO-0113*, 25 DOE ¶ 85,512 (1995) (“The drug user puts his own judgment above the requirements of the laws, by picking and choosing which laws he will obey or not obey. It is further the concern of the DOE that the drug abuser might pick and choose which DOE security regulations he will obey or not obey with respect to protection of classified information.”). In light of the Individual’s admission that he used marijuana in 2003, the LSO was justified in invoking Criterion K. The remaining question is whether the Individual has presented sufficient information to fully resolve the security concern raised by his past marijuana use.

The Individual testified that he used marijuana on several occasions – 13 or 14 – during a period of approximately three months in 2003. He admitted that he allowed himself to be drawn into his then-roommates’ lifestyle because he was going through a difficult period in his life. He stated that he intends to never use marijuana or any other illegal drug in the future because he did not like using marijuana and does not want to feel the way he did when he used it. Also, he stated that he has too much going for him in his life and does not want to jeopardize his goals. The evidence in this case supports the Individual’s statements that his marijuana use was limited to the time period he stated.

The testimony of the Individual’s witnesses supports my conclusion that the Individual was truthful when he stated that he had not used illegal drugs in the recent past. Each of the witnesses appeared to know the Individual well and I believed they testified honestly and candidly. The testimony of the Individual’s mother-in-law was particularly compelling. She has interacted with the Individual on a near-daily basis for approximately four years and has discussed his past with him. She testified that she never saw any evidence that the Individual

used illegal substances and found no reason to suspect him of such use, as demonstrated by the fact that she developed such a favorable opinion of the Individual and allowed him to date her daughter who was several years younger than him. Further, the Individual's cousin and friends interact fairly regularly with the Individual and have seen no signs, either on the Individual himself or in his home, indicating that he uses illegal drugs. They also stated that neither they nor the Individual associate with anyone who uses illegal drugs. Finally, the Individual's supervisor believed the Individual was honest with him when he said he had not used marijuana since 2003. The supervisor, through his discussions with the Individual, was convinced that the Individual's 2003 marijuana use was a lapse in otherwise solid judgment. The supervisor further saw no signs in the Individual's work performance that would indicate that he may be a user of illegal drugs.

Based on the foregoing, I find that the Individual has presented sufficient evidence to fully resolve the Criterion K concern raised by his use of marijuana in 2003.

## **B. Criterion F – Falsification**

As stated above, Criterion F concerns involve deliberate false statements or misrepresentations by an individual during the course of an official inquiry regarding the individual's eligibility for access authorization, including responses during personnel security interviews or on security questionnaires. Such statements or misrepresentations raise serious doubts regarding the individual's honesty, reliability, and trustworthiness. See Adjudicative Guidelines, Guideline E, ¶¶ 15(b), 16(a). The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent that individual can be trusted again in the future. See, e.g., *Personnel Security Hearing, Case No. VSO-0013*, 25 DOE ¶ 82,752 at 85,515 (1995); *Personnel Security Hearing, Case No. VSO-0281*, 27 DOE ¶ 82,821 at 85,915 (1999), *aff'd*, 27 DOE ¶ 83,030 (2000). Given the Individual's admission that he falsified answers on his 2006 and 2008 QNSPs, the LSO had grounds to invoke Criterion F. The only issue remaining is whether the Individual has adequately mitigated the security concerns.

The Individual admitted that he deliberately falsified the answers on his October 2006 QNSP pertaining to his past use of illegal drugs. This omission alone was a serious error and demonstrates a lapse in judgment by the Individual. Although the Individual admitted that he knew it was wrong, it is possible that the Individual's age at the time he completed the form, in addition to his inexperience with DOE security forms, played a role in his decision to omit the information about his 2003 marijuana use. However, the Individual then repeated the omission on another QNSP eighteen months later, in April 2008, after having more experience with the DOE security process. This second falsification is another lapse in judgment and, added to the first falsification, demonstrates a pattern of dishonesty.

Our previous cases have stated that a subsequent pattern of responsible behavior is of vital importance to mitigating security concerns arising from irresponsible behavior. See *Personnel Security Hearing, Case No. VSO-0499* (2002). In most cases in which Hearing Officers have concluded that doubts about an individual's judgment and reliability raised by evidence of falsification have been resolved, a substantial period of time has passed since the falsification. In these cases, the time period has allowed individuals to establish a pattern of responsible behavior. In those cases where an individual was unable to establish a sustained period of



responsible behavior, Hearing Officers have generally determined that the individual was not eligible to hold an access authorization. *See Personnel Security Hearing*, Case No. VSO-0448 (2001) (11 months not sufficient to mitigate four year period of deception); *Personnel Security Hearing*, Case No. VSO-0327 (2000) (less than one year of truthfulness insufficient to overcome long history of misstating professional credentials).

In this case, there are several positive factors in the Individual's favor. The Individual himself disclosed the falsification of the QNSPs to the OPM investigator voluntarily, and with no indication that DOE would have become aware of this information had he not disclosed it. In addition, the Individual readily acknowledged that he was aware that he was providing false answers on the forms when he submitted them. Further, the Individual appears to have matured since he completed the QNSPs and has added responsibilities in his life, including a new marriage. Also, each of the Individual's witnesses testified favorably on the Individual's behalf. It is evident that the Individual's cousin and friends admire him and believe him to be a truthful, responsible adult who always does the right thing. The sentiment was echoed by the Individual's mother-in-law and supervisor.

However, the Individual first admitted his falsifications eight months prior to the hearing, in May 2008. The Individual has not yet had time to establish a significant pattern of responsible behavior. Therefore, based on the recency of the DOE's knowledge of the falsifications and the short amount of time the Individual has had to demonstrate a subsequent pattern of responsible behavior, I cannot find that the security concerns associated with his falsifications have been mitigated. Accordingly, the security concerns set forth in the Notification Letter under Criterion F regarding the Individual's falsification of information on his October 2006 QNSP and April 2008 QNSP pertaining to his 2003 marijuana use have not been mitigated.

## **V. CONCLUSION**

Upon consideration of the record in this case, I find that there was evidence that raised doubts regarding the Individual's eligibility for a security clearance under Criteria F and K. I also find that the Individual has presented sufficient information to fully resolve the security concern raised under Criterion K. However, I find that there is insufficient evidence in the record to fully resolve the Criterion F concern. Therefore, I cannot conclude that granting the Individual an access authorization "would not endanger the common defense and security and would be clearly

consistent with the national interest.” 10 C.F.R. § 710.7(a). Accordingly, I find that the Individual’s suspended access authorization should not be restored at this time.

Diane DeMoura  
Hearing Officer  
Office of Hearings and Appeals

Date: February 18, 2009